Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GEORGE C. FIELDS; GARY E. CROWELL

Petitioners

v.

EUGENE F. ASSAF, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether state officials should ordinarily be entitled to qualified immunity in political firing cases when it is not clear that the position in question is covered by the *Elrod-Branti* rule.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 178 F.3d 170 and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 999 F.Supp. 622 and is reprinted at Pet. App. 25a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1999, and this petition has been filed within ninety days of that date. The Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech."

2. The Civil Rights Act of 1871, 42 U.S.C. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

STATEMENT OF THE CASE

This case concerns the intersection of the Court's political firing and qualified immunity jurisprudence. The Court has said, in the *Elrod-Branti* line of cases, that the First Amendment protects government employees from being fired for political affiliation unless their job is the sort for which, based on their duties, political affiliation may be relevant, and has said that this determination "is not always easy." *Branti*, 445 U.S. at 518.[1] The Court has also said that the doctrine of qualified immunity protects "all but the plainly incompetent" state official from suits for damages where the right in question is not clearly established. *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

Here, respondent claimed that he was fired from his job as Director of the Pennsylvania Bureau of Vehicle Management by a new administration because of his party affiliation. Petitioners, the Secretary and Deputy Secretary of the State Department of General Services, denied this, but argued that they were entitled to qualified immunity because it was not clear that respondent's position was entitled to First Amendment protection. The district court agreed that it was not clear, and granted petitioners' motion for summary judgment, but the Court of Appeals reversed, concluding that the district court had required too close a case on point, and that its own case law, though dealing with other types of jobs and contradicted by decisions in other circuits, provided clear enough guidance to foreclose qualified immunity. The question in this case is

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[1]The trilogy of cases addressing political firing and hiring includes *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 82 (1990).

whether the Court of Appeals properly applied the doctrine of qualified immunity to political firing cases.

1. Respondent was hired by the administration of Governor Robert P. Casey, a democrat. As Director of the Bureau of Vehicle Management, respondent was designated a member of the "Senior Management Service" and reported directly to the Department of General Services Deputy Secretary for Procurement. The Deputy Secretary, in turn, reported directly to the Secretary of the Department of General Services, a cabinet level official. Respondent, as a non-civil service, non-union official, was responsible for the day-to-day operation of the Bureau of Vehicle Management, and was generally responsible for directing his bureau so as to meet the transportation needs of the Commonwealth government while staying within his budget. In this regard, respondent participated with the Deputy Secretary in establishing policies and procedures for obtaining and maintaining the Commonwealth's fleet of 8,000 automobiles. He was responsible for insuring that the cars were properly serviced, and could approve outside shops to perform repairs and recommend rates for servicing and repair. He also supervised Commonwealth automobile auctions. Respondent supervised 33-46 employees whom he could discipline and had input into hiring and firing decisions.

2. After republican Governor Tom Ridge was elected in November of 1994, he replaced the Secretary of the Department of General Services. In March of 1995 respondent was fired. He filed suit in federal court claiming that he was fired for political reasons in violation of his First Amendment rights, and sought money damages. Petitioners asked the District Court for summary judgment arguing that respondent's position was one for which political affiliation could be considered. Alternatively, they argued that, because it was at least unclear

whether respondent's job was protected by the First Amendment in this context, they were entitled to qualified immunity.

The District Court granted petitioners' motion, although it first concluded that political affiliation was not a proper requirement for respondent's job. It reached this conclusion for two principal reasons. First, the District Court said that what was necessary under Third Circuit caselaw was a position with input into decisionmaking concerning a "major government program," and that the Bureau of Vehicle Management was not "major" because it did not involve services to the general public. Pet. App. 42a. Secondly, the court said, respondent had no input into "broad goals" or job responsibilities that were "broad in scope." Pet. App. 44a-45a.

Nevertheless, the District Court concluded that petitioners were entitled to qualified immunity. The court said that the appropriate test is "whether the contours of the right were sufficiently clear that a reasonable official would have known that he could not have fired [the respondent] for political reasons." Pet. App. 49a. The court concluded that the test was not met because Third Circuit precedent "provided no guidance since it was factually distinguishable and because other circuits have split on the issue of whether "middle management" supervisors are entitled to protection from political firings." *Id.* Finally, the district court said that a few of the analytical factors in the *Elrod-Branti* test did favor petitioners. Pet. App. 50a.

3. The Court of Appeals reversed. The court recognized that the inquiry into an employee's duties under *Elrod-Branti* is "fact specific," but believed that, "the District Court's analysis . . . require[s] a closer factual correspondence between the case under examination and prior decided cases than is consistent with qualified immunity doctrine and its application

by this court." Pet. App. 15a. The court went on to say that, "Given the nature of the inquiry in the *Elrod-Branti* cases, we reject appellees' argument that qualified immunity is 'well suited to cases where there is no "bright line" rule.' . . . Were we to adopt this position, we would effectively eviscerate the constitutional imperative behind *Elrod-Branti* jurisprudence." Pet. App. 16a.

Accordingly, the court said that while respondent administered an "important" program it was not a "major government program" under its caselaw because it did not have "a direct impact on the public or representation of government policies to the public." Pet. App. 18a. The court then said that qualified immunity was not appropriate because any reasonable official should have appreciated this distinction: "It should not have been difficult to see that far from representing the government, as was the plaintiff's duty in *Brown* [county assistant director of public information], Assaf's public contact was much more like that at issue in *Zold* [deputy municipal clerk], where we found that political allegiance was not an appropriate criterion for the decision to terminate the plaintiff." Pet. App. 18a-19a.

The court went on to say that respondent's level of responsibility for his Bureau "was not very significant" (Pet. App. 22a) and that "any hypothetical reasonable official should have known that the limited nature of Assaf's authority would place his position in line with those that we held were protected by the First Amendment in *Zold* (deputy municipal clerk who ran day-to-day functions of the clerk's office), *Furlong* (second deputy recorder of deed, who satisfied mortgages, recorded documents and forwarded taxes to the relevant authorities), and *Burns* (deputy sheriff who was responsible for serving process,

transporting prisoners, and guarding courtrooms)." Pet. App. 24a.[2]

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[2]The cases to which the Court of Appeals refers are *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir. 1991); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986); *Furlong v. Gudknecht*, 808 F.2d 233 (3d Cir. 1986); and *Burns v. County of Cambria*, 971 F.2d 1015 (3d Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS

The Court of Appeals' decision is in direct conflict with the courts of appeals of several other circuits — reflecting a conflict among the courts of appeals, and the Court should review this case to resolve that conflict.

In determining whether a government employee's job is protected from political firing under the First Amendment, courts must consider the function of the job and the employee's duties to determine whether party affiliation may be an appropriate requirement for the performance of that job. The Court of Appeals in this case recognized that that inquiry was "fact specific," but nonetheless "reject[ed] appellee's argument that 'qualified immunity is well suited to cases where there is no "bright line" rule.'" Pet. App. 16a. The court apparently believed that if qualified immunity were not circumscribed in these types of cases "the constitutional imperative behind *Elrod-Branti* jurisprudence would effectively [be] eviscerate[d]" and that "liability in such areas could never attach." *Id.*

To avoid this result — in other words, in order to ensure that liability *does* attach — the Court of Appeals would require officials to extrapolate from cases which have little in common with the one before them. In this case, for example, the Court of Appeals faulted the petitioners for failing to see that, in the view of the Court of Appeals, the state Director of Vehicle Management is "much more like" a deputy municipal clerk than

like a county assistant director of public information. Pet. App. 18a-19a.

The Third Circuit's approach is diametrically opposed to that taken by the Courts of Appeals for the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, which have held that, because of the difficult and complicated nature of the analysis for determining the scope of *Elrod-Branti* coverage, qualified immunity ought to be the rule in political firing cases and should be denied only in the exceptionally clear case. In *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995), for example, the court said that because of the case-specific balancing of the rights and interests involved "[t]here will rarely be a basis for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." 65 F.3d at 474. Similarly, in *Conner v. McGraw*, 104 F.3d 358, 1996 WL 741132 (4th Cir. 1996) (unpublished opinion), the court said that the law on the question of whether a Chief Deputy Clerk was a policy making position "was not clearly established" and that "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Slip op. at p.6 (internal quotations and citations omitted). *See also Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997) (ambiguity about whether an unclassified position covered by First Amendment to be construed in favor of government defendants); *Beuregard v. Olson*, 84 F.3d 1402, 1405 (11th Cir. 1996) ("defendants who allegedly violate public employees' First Amendment freedoms rarely act within 'clearly established' contours of law") (internal quotations and citations omitted); *Billingsley v. St. Louis County*, 70 F.3d 61 (8th Cir. 1995) (broad range of positions between

technical and confidential employees for which there are no clear guidelines).[3]

II. THE PROPER SCOPE OF QUALIFIED IMMUNITY IS AN IMPORTANT ISSUE ESPECIALLY IN THE *ELROD* CONTEXT.

This case is important because it addresses the proper scope of the qualified immunity defense, a doctrine which the Court has repeatedly said is designed to shield government officials who perform discretionary acts from liability unless their actions violate rights that are "clearly established." The idea is to resolve any ambiguity in the law in their favor, so that the fear of unpredictable liability does not cause officials to hesitate in making decisions.

The scope of qualified immunity thus presents an important issue in itself, as the Court recognized in *Anderson v. Creighton*, 483 U.S. 635 (1987). But it is especially important in the *Elrod* context. For here the absence of immunity specifically inhibits the ability of officials to carry out the political agenda on which they attained office, and thus undercuts the democratic accountability of those officials.

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[3]Several members of the Court have also expressed concern about the application of the *Elrod-Branti* doctrine in political firing cases and in related First Amendment cases which have extended the doctrine. *See Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, O'Hare Truck Service, Inc. v. City of Northlake*, ___ U.S. ___, ___,116 S.Ct. 2361 (1996) (Scalia, J., dissenting); *Rutan v. Republican Party of Illinois*, 497 U.S. 82, 93-115 (1990) (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 521-534 (1980) (Powell, J., dissenting).

This concept of immunity can be eroded by the way in which courts define the right in question. One way is by defining the right too broadly. The Court granted certiorari in *Anderson v. Creighton*, 483 U.S. 635 (1987), for example, to address the question of the level of specificity at which the right should be defined. The Court held that the definition should not be overly abstract but rather, depending on the case, may require some degree of factual development. This case deals with an application of *Anderson*, and is just as important because it addresses the erosion of qualified immunity in another way.

Here, the Third Circuit has acknowledged that in political firing cases the definition of the right is difficult and fact specific, but has effectively said that for this very reason qualified immunity ought to be narrowly circumscribed so that government officials can be liable. The predictable — and presumably, the intended — effect of this rule will be to inhibit officials from demanding political loyalty from subordinates in all but the clearest cases, lest they fail to predict accurately how the federal courts will view the position in question. *See* Pet. App. 24a (respondent's position as Director of Motor Vehicle Bureau is "in line with" deputy municipal clerk, second deputy recorder of deeds and deputy sheriff).

The potential erosion of qualified immunity here is as serious as that in *Anderson*, and the Court should accept review to address it.

III. THE THIRD CIRCUIT'S RULE IS DIRECTLY AT ODDS WITH THE COURT'S QUALIFIED IMMUNITY JURISPRUDENCE.

The Third Circuit Court of Appeals decision essentially nullifies the existence of qualified immunity as articulated by the Court in *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in political firing cases involving management-level employees. Nothing within the Court's jurisprudence supports the Third Circuit's rejection of qualified immunity as delivered in this case.

Seizing on the Court's instruction in *Anderson* that a clearly established right need not be defined by a previous holding that that "very action in question" is unlawful, the Court of Appeals proceeds to jettison the imperative behind the qualified immunity doctrine in favor of what it terms "the constitutional imperative behind *Elrod-Branti* jurisprudence." Pet. App. 16a. In fact, the Third Circuit's decision, which expresses a preference for liability over immunity in a certain type of case turns the Court's qualified immunity jurisprudence on its head. The Court has recognized that damage suits against government officials "can entail substantial costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638. Accordingly, qualified immunity is designed to provide "ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. at 343. The Court in *Anderson* further emphasized that the doctrine of qualified immunity was a "balance struck across the board," and should be regarded as the "norm" rather than the exception. 483 U.S. at 642.

By contrast, the Court of Appeals has made it clear that in *Elrod-Branti* cases it places the burden of proving qualified immunity squarely on the government officials who have been sued:

> [W]e are satisfied that the decisions of this court have been sufficiently consistent to have clearly established to all state and municipal employes that firing or other adverse employment action for political reasons contravenes the Constitution unless defendants could show that the particular position came within the narrow exception.

Pet. App. 23a-24a, *quoting Burns v. County of Cambria*, 971 F.2d 1015, 1024 (3d Cir. 1992). The Court of Appeals has not given the government employers the benefit of the doubt. That the right which it holds them responsible for violating is not clear is demonstrated by the court's conclusion. It denies qualified immunity because it holds that the employers should have drawn the distinction between what it concedes is an "important function" and what it terms a "major government program," and should have appreciated that the Director of the Bureau of Vehicle Management was "more like" a deputy municipal clerk than a county assistant director of public information.

The Court should accept review to correct this misinterpretation of the law.

CONCLUSION

For these reasons, petitioners respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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DATE: August 17, 1999

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Eugene F. ASSAF, Appellant

v.

George C. FIELDS; Gary E. CROWELL.

No. 98-7153.

United States Court of Appeals,
Third Circuit.

Argued Dec. 14, 1998.

Decided May 19, 1999.

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D. Michael Fisher, Attorney General, R. Douglas Sherman, Calvin R. Koons (Argued), Senior Deputy Attorneys General, John G. Knorr, III, Chief Deputy Attorney General, Appellate Section, Office of Attorney General of Pennsylvania, Harrisburg, PA, for Appellees.

Before: SLOVITER and COWEN, Circuit Judges, and OBERDORFER, [FN*] District Judge.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

I.

Plaintiff Eugene F. Assaf brought this civil rights action against the Pennsylvania state officials responsible for his dismissal from public employment. Assaf's complaint, invoking 42 U.S.C. § 1983, charges that appellees George C. Fields and Gary E. Crowell terminated his employment for political reasons, thereby violating the First Amendment protections for belief and association. The District Court, in ruling on the defendants' motion for summary judgment, concluded that Assaf's job was not one for which party affiliation is an appropriate requirement but nonetheless entered summary judgment for defendants on the basis of qualified immunity. *Assaf v. Fields*, 999 F.Supp. 622, 630-33 (M.D.Pa.1998). Assaf filed a timely appeal. Our review of the grant of summary judgment is plenary. *See Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998).

II.

The record, reviewed in a light favorable to Assaf, reveals the following: Assaf was hired in October 1988 as Director of the Bureau of Vehicle Management for the Commonwealth of Pennsylvania. Assaf, a registered Democrat, was hired by then-Secretary of General Services David Jannetta, who was also a registered Democrat. At the time Assaf was hired, Robert Casey, also a Democrat, was Governor of Pennsylvania.

The Bureau of Vehicle Management is an agency within the Department of General Services. Assaf reported to the Deputy Secretary for Procurement, appellee George Fields. Fields in turn reported to the Director of the Department of

General Services, appellee Gary Crowell. Crowell's position was a cabinet-level one.

Assaf was advised in writing of his employment as a Fleet Maintenance Manager (also referred to as Director of the Bureau of Vehicle Management) and that his position was under the Senior Management Service, a category of Commonwealth positions "in the unclassified service which have broad policy participation and management responsibility." As such, he was exempt from unemployment compensation coverage but covered by the Management Benefits Program. He was further advised that in that position he "serve[s] at the pleasure of the agency head."

Assaf's job description listed as "Major Duties" of the position: "Directs the Bureau of Vehicle Management to meet the transportation needs of all requesting Commonwealth Departments, Agencies, and Commissions while remaining within the financial guidelines of self-generated income." The job description enumerated ten specific duties:

> 1. Participates with the Deputy Secretary in planning, developing and implementing appropriate standards, procedures and policies for obtaining and maintaining the Commonwealth Automotive Fleet.
>
> 2. Stays abreast of the automobile market and recommends when to purchase vehicles based on current sales volume, amount of income received,fixed and semi-fixed expenses, variable expense, and fixed overhead expense.

3. Determines the best type of vehicles to purchase . . . .

4. Directs the operation of the Commonwealth Garage concerned with the service and repair of the automotive fleet. Negotiates and administers regular maintenance contracts with service Agencies and with dealerships for repair and preventative maintenance.

5. Directs the maintenance of all records and reports concerning the Commonwealth Fleet . . . .

6. Oversees the disposition of the Commonwealth owned vehicles. These vehicles are sold through an oral auction which is open to the public. Makes sure that all activities are carried out according to approved policy. Interacts with the general public whenever concerns arise.

7. Directs the payments of repair invoices from various vendors . . . .

8. Oversees the repair of vehicles at the Commonwealth Garage . . . .

9. Directs the temporary vehicle fleet making it available for use by the requesting Commonwealth Agencies to meet their temporary transportation needs . . . .

> 10. Works closely with the various Bureau Chiefs and supervisory personnel to maintain an efficient, logical and financially sound operation.

Assaf supervised the three divisions that made up the Bureau: the Administrative Division, the Vehicle Operations Division, and the Vehicle Maintenance Division. He directly supervised the three employees who headed these divisions. The Bureau as a whole employed a total of thirty-three to forty-six employees over whom Assaf exercised indirect supervision. His starting salary was $37,000 and at the time he was terminated his salary had risen to $52,000.

From the written description, it might have appeared that Assaf's title as Director signified a public official with significant authority. Admittedly, the Director ran the day-to-day operation of the Bureau, which entailed overseeing a fleet of approximately 8,000 vehicles. However, Assaf testified to the substantial limits of his authority. For example, the Director did not have the ultimate authority to hire employees within the Bureau. See Assaf at 50. [FN1] There is evidence that he also did not have the authority to fire Bureau employees. See James W. Martin at 31; Gregory Green at 8-9. Rather, such authority rested ultimately with the Deputy Secretary for Procurement, a position held by Fields. See Green at 9. At most, Assaf could formally reprimand employees who were under his indirect supervision, which he did on a number of occasions. See Assaf at 57-60.

Assaf testified that he had no authority over the Bureau's budget or purchasing decisions and did not negotiate maintenance contracts with outside vendors. See Assaf at 39, 41, 44. Although Assaf assigned vehicles to the various agencies,

Fields had to approve each such decision and Fields retained control over executive vehicle assignments. See Fields at 65-66. Maintenance of the Commonwealth vehicles was performed at the Commonwealth Garage, and although Assaf could approve outside repair shops if they accepted the standard contract from the Commonwealth, the rates for payment were set according to a predetermined formula. See Assaf at 43-44; Fields at 61.

Similarly, although Assaf was listed as having responsibility for auctions, in fact the vehicle auctions were conducted pursuant to a formula used to select the vehicles, and vehicles could not be auctioned unless Fields approved the lists. The target prices for the vehicles at auction were also set by a formula, see Fields at 62-63, and the formula preceded Assaf's tenure, see Assaf at 60.

On January 21, 1995, Thomas Ridge, a Republican, was sworn in as Governor of the Commonwealth of Pennsylvania. Shortly after Governor Ridge's inauguration, Jannetta resigned as Secretary of General Services and Governor Ridge appointed Gary Crowell, a Republican, in his stead. Governor Ridge reappointed Fields as Deputy Secretary for Procurement.

On March 29, 1995, Fields notified Assaf by letter that his services were no longer needed. Fields at 44. The termination decision was made by Secretary Crowell. Crowell at 22-23. According to Assaf, Fields informed him that his termination was for political reasons. See Assaf at 76-77. Fields denies discussing with Assaf whether politics were involved. See Fields at 44.

Assaf applied for unemployment compensation pursuant to the Pennsylvania Unemployment Compensation Law. His application was ultimately denied by the Pennsylvania

Unemployment Board of Review, which ruled that Assaf was not entitled to benefits because his was "a major nontenured policymaking" position and therefore specifically exempted from the unemployment compensation scheme.

On March 5, 1997, Assaf filed this lawsuit in the District Court for the Middle District of Pennsylvania, charging that Fields and Crowell violated the First Amendment by terminating his employment for political reasons. Fields and Crowell moved for summary judgment. Without conceding that Assaf had in fact been fired for political reasons, they urged that Assaf's job was, in any event, not one for which the First Amendment provides protection. In the alternative, they argued that even if Assaf's position was constitutionally protected they were nonetheless entitled to qualified immunity because the unlawfulness of the dismissal would not have been apparent to reasonable officials under clearly established law.

In ruling on the defendants' motion, the District Court first rejected the defendants' argument that Assaf had received the position through political patronage and could not now complain that he lost the position for a similar reason. *See Assaf*, 999 F.Supp. at 628 (*citing Branti v. Finkel*, 445 U.S. 507, 512 n. 6, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (rejecting argument that "because the [employees] knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rejected when control of the office shifted to [another party]."). The court next rejected defendants' argument that political affiliation was a qualification for the job. The court noted that "the overarching factor is whether the worker has 'meaningful input into decision making concerning the nature and scope of a major [government] program.'" *Id.* at 630 (*citing Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1353 (3d Cir. 1994)). The District Court concluded that

"overseeing the cars owned by the Commonwealth and used by its agencies . . . is not a major government program . . . [as it does not] involve services to the general public or to a sizable portion of the public." *Id.* The court thus ruled that Assaf was entitled to First Amendment protection from political discharge. Nonetheless, it held that the defendants were entitled to qualified immunity because it was not clearly established that Assaf could not be fired for political reasons. *See id.* at 633.

III.

Summary judgment is appropriate only if the record discloses that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The record is to be examined in a light most favorable to the non-movant, in this case, Assaf. *See Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1349 (3d Cir. 1994).

At the outset, we note that the only issue before us on this appeal is the propriety of the District Court's ruling that Fields and Crowell were entitled to qualified immunity. Although much of appellees' brief appears directed to the question of whether Assaf's position was "inherently political," Appellees' Br. at 25, the appellees have neither cross-appealed the ruling on that issue nor have they included this as one of their issues on appeal. Accordingly, we will focus on the District Court's determination that under clearly established law, reasonable officials would not have perceived that terminating Assaf for political reasons was unconstitutional. This necessarily requires that we review the applicable law, with particular attention to the dates the leading opinions were announced.

In *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the Supreme Court explained that "the proper analytical framework" for addressing qualified immunity claims is to ascertain first whether plaintiff's claims make out a violation of a constitutional right. *See also Brown v. Grabowski*, 922 F.2d 1097, 1110 (3d Cir.1990). Only if such a violation has been alleged need we proceed to determine whether, in the light of "clearly established law," the unlawfulness of the action would have been apparent to a reasonable official. *See Siegert*, 500 U.S. at 232, 111 S.Ct. 1789 ("A necessary concomitant to

the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."); *County of Sacramento v. Lewis*, 523 U.S. 833, ---- n. 5, 118 S.Ct. 1708, 1714 n. 5, 140 L.Ed.2d 1043 (1998) ("As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated.").

The Supreme Court first established the proposition that as a general matter, a public employer cannot, consistently with the First Amendment, terminate a public employee for political reasons in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In writing for a three-Justice plurality, Justice Brennan reasoned that because requiring financial and campaign assistance to the favored political party "is tantamount to coerced belief" and a required pledge of allegiance "compromise[s] the individual's true beliefs," *id.* at 355, 96 S.Ct. 2673, it follows that "the practice of patronage dismissals clearly infringes First Amendment interests," *id.* at 360, 96 S.Ct. 2673. He also reasoned that conditioning public employment on patronage support "inhibits protected belief and association." *Id.* at 359, 96 S.Ct. 2673 (*citing, inter alia, Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)).

He recognized that the prohibition was not absolute, but allowed an exception only for those in "policymaking" positions "to insure that policies which the electorate has sanctioned are effectively implemented." *Id.* at 372, 96 S.Ct. 2673. The plurality opinion states that "[i]n determining whether an employee occupies a policymaking position, consideration should . . . be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368, 96 S.Ct. 2673. The Court concluded, however, that the

employees whose terminations were at issue in *Elrod*, (the chief deputy of the process division of a sheriff's office, a process server, a process division employee, and a bailiff and security guard at a county juvenile court) did not fall within the exception.

The concurring opinion, written by Justice Stewart on behalf of himself and one other Justice, declined to comment on the first of the plurality's two rationales (that a patronage system tended to coerce employees into compromising their true beliefs) but agreed with the second rationale, i.e. that patronage dismissals effectively imposed an unconstitutional condition on the receipt of a public benefit. The two concurring Justices also agreed that the *Elrod* plaintiffs did not fall within the class of employees with "policymaking" responsibilities who were exempted from First Amendment protection. *See id.* at 374-75, 96 S.Ct. 2673.

Four years later, in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), a firm majority of the Court, this time speaking through Justice Stevens, reiterated that the First Amendment prohibits discharge of public employees for their party affiliation. In *Branti*, the Court addressed the district court's conclusion, affirmed by the court of appeals, that assistant public defenders were not the type of policymaking, confidential employees exempted from the general prohibition on politically motivated dismissals. The Court eschewed overreliance on labels such as "confidential" or "policymaking" and stated that "[i]n sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. 1287. Applying this standard, the Court agreed

that assistant public defenders did not fall within the exception to the general prohibition against politically motivated dismissals from public employment. *See id.* at 520, 100 S.Ct. 1287.

The *Branti-Elrod* decisions were widely publicized, particularly among officials in positions in state and local governments who have authority to hire and fire government employees. It is reflective of this general knowledge that Fields and Crowell do not contend that they were unaware of the severe limitation that was now placed on terminations because of political affiliation. All that remained after *Branti-Elrod* was the application of the principle to the positions of the plaintiffs who brought suit.

Illustrations were soon forthcoming from all the circuits. This court applied and elaborated on the principles enunciated in *Elrod* and *Branti* in a series of cases decided over the last eighteen years. The year after the *Branti* decision, we stated in *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir.1981), that the Court's opinion calls for a "functional analysis," which entails an examination of whether "a difference in party affiliation[would] be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office," in which case a dismissal for political reasons "would not offend the First Amendment." We noted that the *Elrod* plurality suggested that "employees who act as advisers, who formulate plans for implementing broad goals, or whose responsibilities are either not well defined or of broad scope are more likely to function as policymakers." *Id.* at 520 (*citing Elrod*, 427 U.S. at 367-68, 96 S.Ct. 2673). Because the duties of the plaintiffs in *Ness*, the city solicitor and assistant city solicitors of York, Pennsylvania, included "rendering legal opinions, drafting ordinances, [and] negotiating contracts" for the city, which we concluded were "intimately related to city policy," we held that party affiliation

was an "appropriate (even if not necessary) requirement" for their effective performance. *Id.* at 522.

Again, in *Brown v. Trench*, 787 F.2d 167 (3d Cir.1986), we held that the Assistant Director of Public Information for a Pennsylvania county could be dismissed on account of her political affiliation because her "position is one which cannot be performed effectively except by someone who shares the political beliefs of the Commissioners." *Id.* at 170. Although we reversed judgment for the defendants because Brown had not been given a pretermination hearing, we used that decision as a vehicle to "specif[y] the factors that indicate that a position falls within the *Branti* test." *Id.* at 169. Looking to cases decided by other courts, we identified as relevant "whether the employee's duties are simply clerical or related to law enforcement" or "nondiscretionary or technical," "whether the employee participates in Council discussions or other meetings, whether the employee prepares budgets or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers." *Id.* (citations omitted).

After reviewing these considerations, we concluded that the "key factor seems to be not whether the employee was a supervisor or had a great deal of responsibility but whether the employee has 'meaningful input into decisionmaking concerning the nature and scope of a major [government] program.'" *Id.* at 169-70 (*quoting Nekolny v. Painter*, 653 F.2d 1164 (7th Cir.1981)). This factor was to be determinative in many of the cases we decided thereafter.

In *Zold v. Township of Mantua*, 935 F.2d 633 (3d Cir.1991), we were called upon to decide whether the politically motivated discharge of a deputy municipal clerk violated the

First Amendment. Synthesizing our case law on the subject, we stated that

> the ultimate inquiry . . . is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the particular office involved. . . . [S]hould a difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office, dismissals for that reason would not offend the First Amendment. The burden of proof is on the defendant to demonstrate an overriding interest in order to validate an encroachment on an employee's First Amendment rights.

Id. at 635 (quotation marks and citations omitted). In light of these principles we concluded that the deputy municipal clerk — whose duties included "acting as (1) secretary to the governing body, (2) secretary of the municipal corporation, (3) election official and (4) administrative official on the municipal level," *id.* at 637 — was not a position for which political firing was permissible. *See id.* at 640.

In addition to holding the politically motivated discharges of the deputy clerk impermissible in *Zold*, we also found impermissible the discharge of a second deputy recorder of deeds, *see Furlong v. Gudknecht*, 808 F.2d 233, 238 (3d Cir.1986); a deputy sheriff, *see Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3d Cir.1992); and a deputy director of marketing and communications for a county aviation department, *see Boyle v. County of Allegheny Pennsylvania*, 139 F.3d 386, 401 (3d Cir. 998). On the other side of the line, we found that

political affiliation was relevant for a director of a state agency concerned with the provision of veterans' benefits, *see Waskovich v. Morgano*, 2 F.3d 1292, 1303 (3d Cir.1993), a secretary of an interstate port authority, *see Peters*, 16 F.3d at 1359, as well as the county assistant director of public information referred to above, *see Brown*, 787 F.2d at 170.

The District Court's conclusion that Assaf's position was not one for which political affiliation may be required was fully supported by the evidence submitted in connection with the summary judgment issue, as Assaf did not have significant input into a major government program within the contemplation of our case law. However, the District Court proceeded to hold that it was not clearly established that Assaf's position was one for which political affiliation could not be required and that therefore the defendant officials were entitled to qualified immunity. It offered three rationales for this conclusion.

The first was that "except for *Waskovich*, the existing Third Circuit precedent provided no guidance." *Assaf*, 999 F.Supp. at 633. However, *Waskovich* itself emphasized the same factors identified in our prior cases: whether the employee had "meaningful input into decision making concerning the nature and scope of a major [government] program." *Waskovich*, 2 F.3d at 1297 (*quoting Brown*, 787 F.2d at 169-70). Instead, the District Court's analysis appears to require a closer factual correspondence between the case under examination and prior decided cases than is consistent with qualified immunity doctrine and its application by this court.

When deciding whether the law is clearly established, the Supreme Court has cautioned against looking at the constitutional issue too abstractly. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Rather,

the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S.Ct. 3034. On the other hand, "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* (citation omitted).

Given the nature of the inquiry in the *Branti-Elrod* cases, we reject appellees' argument that qualified immunity is "well suited to cases where there is no 'bright line' rule." Appellees' Br. At 12. Were we to adopt this position, we would effectively eviscerate the constitutional imperative behind *Branti-Elrod* jurisprudence. Under the qualified immunity regime contemplated by appellees, liability in such areas could never attach because the lack of "bright line" rules inherent in the doctrine would continually provide cover for violations of constitutional rights. In an earlier case in which we rejected the defendants' qualified immunity claim, we explained that if we were to require "'precise factual correspondence' between the case at issue and a previous case . . . we would not be 'faithful to the purposes of immunity by permitting . . . officials one liability-free violation of a constitutional or statutory requirement.'" *Burns*, 971 F.2d at 1024 (*quoting People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144-45 (3d Cir. 1984)).

Contrary to the District Court's assertion, our cases have given guidance to government officials within our circuit. An employee may be terminated for political reasons only if "a difference in party affiliation [is] highly likely to cause an

official to be ineffective in carrying out the duties and responsibilities of the office," *Waskovich*, 2 F.3d at 1297 (internal quotation marks omited), and that only if an employee's duties make it possible to cause "serious political embarrassment," *id.* at 1302, will the position meet the narrow *Branti-Elrod* exception.

We have noted that the inquiry into the employee's duties is a "fact specific" one, *id.* at 1297 (*quoting Zold*, 935 F.2d at 635), and that although we look to "the functions of the public office in question and not the actual past duties of the particular employee involved," *id.* (*quoting Brown*, 787 F.2d at 168) (alteration and internal quotation marks omitted) evidence of past job duties may be, and often is, informative, *see Peters*, 16 F.3d at 1353.

Officials to whom this court applied the *Branti-Elrod* exception before Assaf's termination, such as the director of an interstate port authority charged with, *inter alia*, the responsibility for developing a master economic plan for an interstate district, in *Peters*, 16 F.3d at 1354-55, the director of a state veteran's services agency responsible for overseeing the delivery of benefits and services to veterans, in *Waskovich*, 2 F.3d at 1297, and the secretary for a county's office of public information charged with duties such as "preparing and distributing press releases, contacting media representatives, and promoting county projects," and who hence represented the county government to the public, in *Brown*, 787 F.2d at 168, were those with responsibility connected to major government programs. The common thread among them is that their positions related to the government's activity vis-a-vis the public. That is, these positions entail the formulation or implementation of policies that have a direct impact on the public or the representation of government policies to the public.

By contrast, Assaf was charged with the responsibility of directing — within a very narrow compass of authority — an agency overseeing the Commonwealth's motor pool. While this is, to be sure, an important function, it is not a "major government program" in the sense that phrase is used in our case law. The acquisition, maintenance, and disposition of the Commonwealth's vehicles is a largely endogenous function of the state government and as such serves an internal and practical purpose — supplying vehicles to Commonwealth agencies and executives, maintaining these vehicles, and overseeing the purchase and sale of the vehicles. There is nothing in these functions that would lead a reasonable official to conclude that the Director of the Bureau of Vehicle Management made such politically sensitive policy judgments that the Director need have a common political philosophy with the incumbent political regime.

Moreover, Assaf's position did not involve significant contact with the public. He did not represent the Commonwealth or speak in its name, and was thus unlike the plaintiff in *Brown* who "present[ed] the views of the [County] Commissioners to the press and public on a daily basis." 787 F.2d at 170. Assaf's only interaction with the public occurred at the auction of the surplus fleet vehicles, plainly not the type of public appearance that requires the employee to hew to a particular party's line. As the District Court noted, to the extent that this function involves interaction with the public, it is "a tiny segment of the public, who appear voluntarily for what is essentially a commercial transaction — the purchase of a car." *Assaf*, 999 F.Supp. at 630.

It should not have been difficult to see that far from representing the government, as was the plaintiff's duty in *Brown*, Assaf's public contact was much more like that at issue in *Zold*, where we found that political allegiance was not an

appropriate criterion for the decision to terminate the plaintiff. In *Zold*, the public contact of the plaintiff, the deputy township clerk, was more extensive than Assaf's, involving as it did "informing reporters about the agenda of upcoming meetings and . . . receiving inquiries and complaints from the electorate . . . and responding in kind." 935 F.2d at 638 (citation and internal quotation marks omitted).

We reject appellees' argument that our decision in *Waskovich* could have been understood by reasonable officials to render the political firing of Assaf lawful. The plaintiff in *Waskovich* was the former Director of the New Jersey Division of Veterans' Administrative Services, and as such was responsible for the administration of services and benefits to an estimated 900,000 veterans throughout the state. *See Waskovich*, 2 F.3d at 1302. Although Waskovich oversaw the day-to-day operations of veterans' facilities, he also advocated for the veterans that were in the state's care. *See id.* at 1300. We described his role as that of a government official who "orchestrate[s] the provision of veteran services." *Id.* at 1302. In holding Waskovich's position exempt, we emphasized that Waskovich had significant policymaking authority with respect to this position, and that "he was involved in policy matters on a day-to-day basis, that he made recommendations on policy matters on several occasions, that his superiors asked for his views of major policy proposals such as capital improvement programs, and that he often opposed policies they espoused." *Id.* at 1300.

Assaf's position, on the other hand, concerns the administration of the state's fleet of vehicles. Without denigrating the importance of such a position, there is no reason to conclude that high state officials would have analogized Assaf's position to *Waskovich's*. In light of Assaf's lack of any

significant contact with the public and the undisputed fact that Assaf's level of responsibility did not touch on politically sensitive issues, which would raise the likelihood of serious political embarrassment, no official cognizant of the existing precedents of this court could have concluded that the modest managerial responsibilities over the Commonwealth agencies' fleet of cars would constitute meaningful input into a major government program.

The second reason given by the District Court for its qualified immunity decision was that Assaf's status as "middle management" made it objectively reasonable for appellees to believe that his position was subject to patronage dismissal. Nothing in this circuit's precedents suggests that middle managers qua middle managers are more likely to fall within the exception than other types of employees. In fact, not one of our *Branti-Elrod* decisions even mentions the term "middle management" or "middle manager." To the contrary, as we observed in *Brown*, managerial or supervisory authority, by itself, does not suffice to bring a position within the *Branti-Elrod* exception. *See Brown*, 787 F.2d at 169-70. In short, to label someone a middle manager says nothing about whether or not that person has significant policy-making responsibilities that make adherence to the incumbent party's political philosophy a necessary job requirement.

In a similar vein, the District Court suggested that the division of authority between the Seventh Circuit in *Selch v. Letts*, 5 F.3d 1040 (7th Cir.1993), and the Fourth Circuit in *Akers v. Caperton*, 998 F.2d 220 (4th Cir.1993), supports the determination that it was unclear whether Assaf's duties were such that he was subject to patronage dismissal. These cases have little to say about the kind of position involved here, nor do they stand for the proposition, implicit in the District Court's

analysis, that middle managers may be subject to political firing. *Selch* concerned the position of "subdistrict superintendent," a job that involved "plan[ning the] annual workload and determin[ing] resource requirements based upon that plan; — investigat[ing] and tak[ing] corrective action on complaints and information requests from the general public; [and] — provid[ing] personal supervision, personnel, and equipment during emergencies, such as snow and ice removal, detours, accidents, and road repairs, etc." *Id.* at 1044-45. *Akers* involved the holder of a similar job — that of "county maintenance superintendent." The Seventh Circuit in *Selch* held that the position was one for which patronage dismissal was constitutionally permissible; the Fourth in *Akers* had held the opposite.

The *Selch* and *Akers* plaintiffs had a great deal of responsibility to decide how the physical maintenance of streets gets done, and, as well known, local political regimes can stand or fall on the incumbents' ability to fix potholes and remove snow. In any event, those decisions from other circuits cannot reasonably have been relied on by officials in a state within this court's jurisdiction when this court has numerous opinions to serve as guidance on the subject.

The final reason offered by the District Court in support of qualified immunity was the observation that "Assaf's duties were not merely technical, he participated in meetings, and he could control others." *Assaf*, 999 F.Supp. at 633. This description, however, could just as well apply to any public employee with a measure of supervisory responsibility. Although Assaf met with the Deputy Secretary every two weeks along with the other Bureau Directors, occasionally met with Fields alone, and on three occasions attended out-of- state programs held by the National Association of Fleet

Administrators that highlighted products and involved discussions of fleet management techniques, these functions say nothing significant about the extent to which his duties required that he have the same political affiliation as the incumbent regime.

In his position as Director of the Bureau of Vehicle Management for the Commonwealth, Assaf had management responsibilities in three principal areas: (1) obtaining and maintaining the Commonwealth's fleet of vehicles; (2) directing the operation of the Commonwealth Garage (i.e., supervising the maintenance of the fleet); and (3) overseeing the disposition of Commonwealth-owned vehicles at auction. These duties do not involve matters that have an impact on the public nor does the Bureau Director represent the government in its interactions with the public. It would be manifestly unreasonable for officials to believe that such an intragovernmental operation as the management of the state's fleet of vehicles involves politically sensitive matters.

Although Assaf's lack of input into a program that can be considered major is sufficient to establish that it should have been apparent to reasonable officials that his job was protected under the First Amendment, it should also have been known to his superiors that Assaf's level of responsibility within the Bureau was not very significant. In particular, the record suggests that Assaf did not enjoy the power to hire or fire employees, but only to reprimand them. He directly supervised only three employees. He oversaw the purchase of vehicles, but did not have authority to make purchasing decisions for the Commonwealth. He had no input into his budget. As Bureau Director, he managed the Commonwealth Garage, but had no authority to negotiate maintenance contracts with outside vendors. Assaf oversaw the administration of the auctions, but

the selection of cars and the target prices to be achieved at auction were set by formula, not according to the Director's initiative. Although Assaf instituted a set of procedures for the conduct of the auction when he learned of dissatisfaction with the auction process, the minor nature of the changes, i.e. changing the process for counting money, installing a locking door on the auction stage, and attempting to ensure that the target prices were obtained, *see Assaf* at 93-95, show the technical nature of his input.

Appellees make much of the fact that Assaf forwarded to Fields a suggestion for altering the formula for calculating the labor rates for maintenance contracts (a suggestion ultimately adopted by Fields), but we do not find in this event an indicium of "significant input into broad goals" sufficient to support qualified immunity. Leaving aside the fact that the suggestion was not, in the first instance, the product of any initiative on Assaf's part, the narrow ambit of the suggestion and the fact that it was up to Fields to make the ultimate decision as to whether it would be implemented further suggest that such "broad goals" as the Bureau may have had were firmly in the control of Fields, not Assaf. As the District Court aptly summed up, "the plaintiff ran the day-to-day operation of the Bureau, but Fields kept a 'tight rein.'" *Assaf*, 999 F.Supp. at 626.

In an earlier *Branti-Elrod* case, we rejected the defendants' contention that the right at issue was not clearly established, stating that "we are satisfied that the decisions of this court have been sufficiently consistent to have clearly established to all state and municipal employers that firing or other adverse employment action for political reasons contravenes the Constitution unless defendants could show that the particular position came within the narrow exception." *Burns*, 971 F.2d at 1024. That conclusion is just as applicable

here. Here, as in *Burns*, the defendants "should have related this established law to the instant situation." *Id.* at 1025, (quoting *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir.1985) (internal quotation marks omitted)).

The nature and limits of Assaf's responsibilities and authority were not unknown to defendants Fields and Crowell. After all, it was Fields to whom Assaf directly reported, and Fields in turn reported to Crowell. In fact, Crowell who, as the Secretary of General Services, was responsible for Assaf's termination, testified at his deposition that party affiliation was not an appropriate requirement for the job. *See* Crowell at 61. In *Burns*, we saw no reason why any "reasonable employer" would have thought that the employee "could be fired for political reasons." *Burns*, 971 F.2d at 1024. Any hypothetical reasonable official should have known that the limited nature of Assaf's authority would place his position in line with those that we held were protected by the First Amendment in *Zold* (deputy municipal clerk who ran day-to-day functions of the clerk's office), *Furlong* (second deputy recorder of deeds, who satisfied mortgages, recorded documents and forwarded taxes to the relevant authorities), and *Burns* (deputy sheriff who was responsible for serving process, transporting prisoners, and guarding courtrooms).

Consequently, we hold that a reasonable official would not have concluded under clearly established law that political loyalty could be required for Assaf's position.

IV.

For the reasons set forth, we will reverse the decision of the District Court granting summary judgment to defendants on the ground that they have qualified immunity. As the defendants

have argued that they did not dismiss Assaf for political reasons, we will remand for further proceedings.

FN* Hon. Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

FN1. Throughout this opinion all citations to deposition testimony will be referenced by the name of the deponent followed by the page number of the transcript.

Eugene F. ASSAF, Sr., Plaintiff,

v.

George C. FIELDS, Gary E. Crowell, Defendants.

Civil Action No. 1:CV-97-343.

United States District Court, M.D. Pennsylvania.

Feb. 13, 1998.

Lawrence S. Markowitz, York, PA, for plaintiff.

R. Douglas Sherman, Attys. Gen. Office, Harrisburg, PA, for defendants.

MEMORANDUM

CALDWELL, District Judge.

I. Introduction

This case presents a *Branti-Elrod* claim. *See Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The plaintiff, Eugene F. Assaf, Sr., alleges that his first amendment rights were violated when he was fired from his job with the Department of General Services for the Commonwealth of Pennsylvania on the basis of party affiliation. The plaintiff, a Democrat, lost his job shortly after Tom Ridge, a Republican,

was elected Governor. The plaintiff seeks compensatory and punitive damages.

The defendants are Gary E. Crowell and George C. Fields. Crowell is the Secretary of the Department of General Services, and Fields was Deputy Secretary of Procurement in the Department and the plaintiff's immediate supervisor at the time of his discharge.

We are considering the defendants' motion for summary judgment under Fed.R.Civ.P. 56. The defendants deny that plaintiff was fired for political reasons but argue that, even if he was, political affiliation is a valid condition for the job. They also argue that, even if the first amendment protected his job, they are entitled to qualified immunity. As we read the cases, the main issue presented is whether the plaintiff's job allowed him to have input into the nature and scope of a major governmental program or to shape the public's perception of that program. If so, then he has no first amendment claim because these duties are so significant they entitle high-level officials to take into account political affiliation in filling the job.

We will evaluate the defendants' motion under the well established standard. *See Davis v. Portline Transportes Maritime Internacional*, 16 F.3d 532, 536 n. 3 (3d Cir.1994). In doing so, we note that, while the parties emphasize different facts, there is no dispute as to the material ones. The case is therefore suitable for summary judgment, and we present the following background in the light most favorable to the plaintiff.

II. Background.

The plaintiff, a Democrat, was hired in October 1988 as Director of the Bureau of Vehicle Management while Robert P.

Casey, also a Democrat, was governor. The Bureau is an agency within the Department of General Services and is responsible for some 8,000 cars that the Commonwealth owns for the transportation needs of various state agencies.

Republican Tom Ridge won the November 1994 election for governor over his Democratic opponent and was inaugurated in January 1995. In the same month, Governor Ridge chose Gary E. Crowell to be the Secretary of the Department of General Services. Immediately below Crowell, George Fields was the Department's Deputy Secretary for Procurement, occupying that position from January 1990 until February 1996. As Director of the Bureau of Vehicle Management, plaintiff reported directly to Fields.

In March 1995, Fields fired the plaintiff. The plaintiff alleges that Fields admitted at that time that he was being terminated because of politics. The defendants deny this was the reason. Crowell asserts that he wanted to establish an atmosphere of customer service for state employees and members of the general public who did business with the Bureau and that, as he assessed plaintiff, he was lacking in those areas.

Assaf's job was exempt from civil service protection and was non-union. When he was hired in 1988, the Commonwealth's letter confirming his appointment informed him that his position was covered under the "Senior Management Service," a category of positions deemed to "have broad policy participation and management responsibility." (Assaf deposition, exhibit 3). As such, he served "at the pleasure of the agency head." (*Id.*). The letter also informed him he was ineligible for unemployment compensation.

The Bureau is formally divided into three sections, the Administrative Division, the Vehicle Operations Division, and the Vehicle Maintenance Division. As the Director of the Bureau, Assaf supervised these sections and a total of 33 to 46 employees He started at an annual salary of $37,000 and ended with a salary of $52,000. He ran the day-to-day operation of the Bureau.

In June 1990, the plaintiff received a written job description (which identified his position with the alternative title of "fleet maintenance manager"). His duties were listed in ten numbered paragraphs, but we can divide them into general and subsidiary duties as follows.

First, the plaintiff's "major duties" were:

> Directs the Bureau of Vehicle Management to meet the transportation needs of all requesting Commonwealth Departments, Agencies, and Commissions while remaining within the financial guidelines of self-generated income. (Assaf deposition, exhibit 5).

He then had three general duties:

> Participates with the Deputy Secretary in planning, developing and implementing appropriate standards, procedures and policies for obtaining and maintaining the Commonwealth Automotive Fleet;
>
> Directs the operation of the Commonwealth Garage concerned with the service and repair of the automotive fleet. Negotiates and

> administers regular maintenance contracts with service Agencies and with dealerships for repair and preventive maintenance;
>
> Oversees the disposition of the Commonwealth owned vehicles. These vehicles are sold through an oral auction which is open to the public. Makes sure that all activities are carried out according to approved policy. Interacts with the general public whenever concerns arise.
>
> (*Id.*, exhibit 5, ¶¶s 1, 4 and 6).

Certain subsidiary duties are also specified: "stays abreast of the automobile market and recommends when to purchase vehicles. . . ."; "determines the best type of vehicles to purchase"; "directs the maintenance of all records and reports concerning the Commonwealth Fleet"; "assures that all of the vehicles are properly licensed" and titled; "directs the payment of repair invoices from various vendors . . ."; "oversees the repair of vehicles at the Commonwealth garage"; "directs the temporary vehicle fleet making it available for use by the requesting Commonwealth agencies. . . ." (*Id.*) [FN1]

> FN1. In August 1992, the plaintiff also acknowledged that his "essential job functions" included:
>
> 1. Ability to plan, develop, and implement appropriate standards, procedures and policies for obtaining and maintaining the Commonwealth Automotive Fleet.

2. Ability to properly utilize proper communication skills.

3. Ability to motivate, discipline and instruct subordinates in a fair and impartial manner.

4. Ability to learn and apply the principles of modern supervision.

5. Ability to interview prospective employees.

9. (sic) Ability to ensure all subordinates observe rules and regulations and strive to achieve Departmental objectives.

(*Id.*, exhibit 5).

Assaf actually discharged these duties as follows. Overall, the plaintiff ran the day-to-day operation of the Bureau, but Fields kept a "tight rein." Consequently, as to his three main responsibilities, Assaf had input but he could not make the ultimate decision; that was up to Fields.

Thus, as to obtaining new vehicles, and contrary to the job description, Assaf did not recommend when they should be purchased. The Bureau of Purchasing decided how many cars to buy and when to do so, conditioned on Fields' approval. Plaintiff's only input into the purchase decision was indirect because he decided when cars should be auctioned, and the income from the auctions partially determined how many cars could be purchased. According to Fields, Assaf used a

"formula" to decide which cars to auction, although the formula was not a "strict" one.

Similarly, as to assigning vehicles to the various agencies, while Assaf made that decision, Fields had to approve it. Moreover, Fields had control over executive vehicle assignments.

Second, as to repairs and routine maintenance for Commonwealth vehicles, maintenance was done at the Commonwealth Garage according to manufacturers' warranties and changed by Assaf only when the manufacturer recommended a change. Assaf could approve outside repair shops to do work for the Commonwealth if they had certain capabilities. These shops could perform repair work if they accepted the standard contract from the Commonwealth, which Assaf did not draft. The rates they were paid could increase based on a formula tied into inflation. Assaf could change these rates and the changes were normally approved, but nonetheless the Deputy Secretary and the Secretary had authority to reject Assaf's decisions.

Third, as to the auction of Commonwealth vehicles, as noted above, a formula was used to select the cars for auction although some discretion was used, depending, among other things, on the maintenance history and the number of a particular make of vehicle in stock. Fields had to approve Assaf's list of cars to be auctioned. The target price that the Commonwealth sought for each vehicle was also set by a formula which could take into account the condition of the individual vehicle.

As to more general duties, Assaf had no final authority to hire or fire but could make recommendations about those matters. He could also discipline employees. He had no input into his budget. He could make certain contracts. He could not

make capital improvements to the Commonwealth Garage. He did have meetings with the Deputy Secretary every two weeks along with the other Bureau Directors and occasionally alone. At one point during his tenure, he responded to criticism from a buyer at the auction by writing to Fields and asserting that "the new changes and policies I have established have made this auction respected throughout the State and outside the State." (Assaf deposition, exhibit 11).

The defendants credit the plaintiff with a number of positive accomplishments. Assaf assesses them differently. Thus, the defendants assert that Assaf was "instrumental in changing Bureau policies and practices with respect to the auctioning of surplus State automobiles to increase security." Assaf says he locked a door to the auction stage while the auction was going on. The defendants contend that he established firm target prices on vehicles in a professional manner, increased revenue from the auctions, increased participation by the public bidding on the cars and installed good business practices. Assaf says the formula for pricing was already there and that he just generated a mailing list to notify the public of auctions. The defendants also assert that Assaf took steps to involve the State Attorney General's Office in investigating possible collusion by bidders at auction. Assaf says that he merely notified the Attorney General whose office successfully investigated the bidders. The defendants contend that Assaf changed the labor rates for repair work from a statewide rate to a countywide rate. Assaf says he just passed along a suggestion from an employee which Fields approved. The defendants assert that Assaf was involved in changing the way state agencies were charged for vehicle rentals by taking into account the type of car, among other things. Assaf says that a formula had been in place for years about this and Fields actually made it work. Finally, the defendants contend that the

plaintiff "represented" the Commonwealth at three conferences of the National Fleet Administrators. The plaintiff counters that he merely attended the conferences and reported on them.

After he was fired, the plaintiff applied for unemployment compensation. The Unemployment Compensation Board of Review rejected his application after applying state law that took into account the *Elrod* and *Branti* decisions.

At Crowell's deposition taken in connection with this case, the following exchange took place:

> Q To do the job of director of vehicle management, do you think party affiliation is an appropriate requirement to effectively do that job?
>
> A No. I do not.
>
> (Crowell deposition at p. 61)

III. Discussion.

A. Whether the Plaintiff Had First Amendment Protection For His Job.

We must begin by deciding whether the plaintiff has a first amendment claim at all, and only then proceed to the issue of qualified immunity. *See In re City of Philadelphia Litigation*, 49 F.3d 945, 961 (3d Cir.1995).

A state violates an employee's first amendment rights by discharging him on the basis of his political affiliation. *Peters*

v. Delaware River Port Authority, 16 F.3d 1346 (3d Cir.1994) However, there is an exception when "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 1353.

In deciding whether it is, we must examine whether the worker has "meaningful input into decision making concerning the nature and scope of a major [government] program." *Id.* (brackets added in *Peters*) (quoted case and internal quotation marks omitted), or whether he "acts as an adviser or formulates plans for the implementation of broad goals," *id.* at 1352 (*quoting Elrod*, 427 U.S. at 368, 96 S.Ct. at 2687, 49 L.Ed.2d at 562), or whether she acts as a spokesperson communicating the policies of superior officials. *Brown v. Trench*, 787 F.2d 167 (3d Cir.1986).

Stated another way, if " 'a difference in party affiliation [is] highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office,' " *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir.1993) (brackets added) (*quoting Zold v. Township of Mantua*, 935 F.2d 633, 635 (3d Cir.1991)), or if a person's position made it possible to cause "political embarrassment" for higher officials, *id.*, he can be dismissed without violating the first amendment. *Id.*

To aid in this evaluation we examine the duties the employee actually performed. Thus, we look at the following factors:

> whether the employee's duties were simply nondiscretionary or technical; whether the employee participated in discussions or meetings; whether the employee prepared budgets; whether the employee had the

> authority to hire or fire other employees; the employee's salary; whether the employee could control others and speak in the name of policymakers.

See Waskovich, 2 F.3d at 1297; *Peters*, 16 F.3d at 1353.

We must also look at the inherent functions of the office in question rather than the particular duties performed by the plaintiff because high-level officials should be able to structure the job as they wish rather than be limited by those who occupied the position in the past. *Waskovich*, at 1297- 98; *Peters*, 16 F.3d at 1353; *Ness v. Marshall,* 660 F.2d 517, 522 (3d Cir.1981); *Zold, supra*, 935 F.2d at 640.

"[E]ach decision is fact specific." *Peters*, 16 F.3d at 1353 (brackets added).

> The troublesome questions arise at the margins. Courts have candidly acknowledged that "between the strictly menial government worker . . . and the policymaker/confidential assistant . . . there is a range of government positions for which the propriety of patronage firing has depended largely on the courts' juggling of competing constitutional and political values." *Upton v. Thompson*, 930 F.2d 1209, 1213 (7th Cir.1991), *cert. denied*, [503] U.S. [906], 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992) . . .

Waskovich, 2 F.3d at 1297.

The Third Circuit has also stated that the classification of the job under state law is also a factor to be considered, *id.* at

1299 n. 7 (exemption from civil service protection is one factor among others to be considered), along with the amount of the position's salary. *Peters, supra*, 16 F.3d at 1358.

Because the plaintiff's position is supervisory or middle management, we also find *Rice v. Ohio Department of Transportation*, 14 F.3d 1133 (6th Cir.1994), relevant. In *Rice*, the Sixth Circuit, quoting Justice Brennan's opinion in *Elrod*, noted:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well- defined objectives. An employee with responsibilities that are not well- defined or are of broad scope more likely functions in a policymaking position.

Id. at 1139 (*quoting Elrod*, 427 U.S. at 367-68, 96 S.Ct. at 2687, 49 L.Ed.2d at 562).

We also note that courts outside the Third Circuit have found political affiliation appropriate when the employee was charged with implementing an important public policy even if his input on the policy was limited. *See Collazo Rivera v. Torres Gaztambide*, 812 F.2d 258 (1st Cir.1987); *Selch v. Letts*, 5 F.3d 1040, 1046 (7th Cir.1993) (in implementing policy an employee

may sometimes create policy). They have also exempted a position from first amendment protection when it was in the line of communication to high-level officials such that the officials had to rely on the person holding the job for information about an important public program. *See Rice, supra; Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir.1991) (political affiliation appropriate consideration for job of mayor's secretary when she controlled the line of communication to the mayor).

Against this legal background, we proceed to the parties' arguments on summary judgment.

In moving for summary judgment, the defendants first argue that the plaintiff's claim should be rejected because he received the position as a result of political patronage and should not now be allowed to complain that he lost the job for the same reason. This argument has no merit because the Supreme Court rejected it in *Branti, supra*, 445 U.S. at 512 n. 6, 100 S.Ct. at 1292 n. 6, 63 L.Ed.2d at 580 n. 6.

The defendants next argue that the position of Director of the Bureau of Vehicle Management is the type of job for which political affiliation is an appropriate consideration. They rely on the following facts. First, Assaf was in charge of the Bureau and was only on the third level down in the hierarchy from the Secretary of the Commonwealth.

Second, the inherent function of the job as established in the job description conferred on Assaf the right to participate with the Deputy Secretary in planning, developing and implementing policies for his three main job duties: (1) the acquisition and maintenance of the Commonwealth's fleet of automobiles; (2) overseeing service and repair of the fleet; and (3) overseeing the public auction of vehicles. The defendants

compare Assaf to the plaintiff in *Waskovich, supra*. In that case, the Third Circuit decided that a state employee who had input into policy decisions had no first amendment protection for his job based on party affiliation.

Third, the Commonwealth designated Assaf's job as a policymaking one and exempted it from civil service protection. Under *Waskovich*, this is a factor favoring the political nature of the job. Fourth, in a closely connected argument, the state determined that he was ineligible for unemployment compensation by ruling that he was a policymaker, and did so in light of federal law in this area.

Fifth, Assaf controlled the line of communication to his two superiors who had to depend on him to inform them of matters at the Bureau, so under *Faughender*, the job was political.

Sixth, the defendants rely on what Assaf actually did during his tenure. He represented the Commonwealth at conferences of the National Fleet Administrators. He had input into hiring and firing, could discipline workers, and, most importantly, he had boasted of the "policies" he had established. At the very least, he had input into policymaking decisions (so the fact that he needed approval from his superiors is unimportant). The defendants also contend that the amount of his annual salary, $52,000 in March 1995 when he was discharged, supports their position.

Finally, citing *Waskovich, supra*, the defendants contend that Assaf was in a position to embarrass them politically if he did not perform competently. They assert that the potential for "waste, financial impropriety and fraud" requires someone in the job who is politically in tune with them. As further support, they

point to Crowell's goal of establishing an atmosphere of customer service and his desire to have workers advancing this goal.

In opposition, the plaintiff first argues that Crowell's admission when he was deposed that he did not think party affiliation was an appropriate requirement for the job is sufficient to defeat the motion for summary judgment and send the case to a jury. In the plaintiff's view, Crowell by his own admission has conceded the determinative issue in the case.

We do not agree. The question was couched in legal terms so Crowell's answer might have only meant that he thought political affiliation was not a necessity for doing the job. If so, the answer is relatively meaningless because the law requires only that political affiliation be an appropriate requirement for the job; not a necessity for the job itself. As the defendants point out, that Crowell thought that either a Democrat or Republican could do the job does not address the real issue, whether high-level officials could make political affiliation a qualification for the job.

In this regard, the case is similar to *Waskovich, supra*, where high-level officials stated that party affiliation was not a qualification for the job and that it would not be used to determine whether the plaintiff there would retain his job. On appeal, the plaintiff in *Waskovich* asserted that these statements were sufficient to take the case to trial and that the district court had erred in granting the defendants' motion for summary judgment. In the course of affirming the grant of summary judgment, the Third Circuit rejected this argument, noting that the officials had gone on to discuss the necessity of a subordinate official sharing the same political philosophy as his superiors.

2 F.3d at 1301-02. In the instant case, the defendants have likewise argued that a common political philosophy is important.

As also stated in *Waskovich*, 2 F.3d at 1302, *quoting Ness, supra*, 660 F.2d at 522: "while it is conceivable that governor might employ speech writing assistants without regard to their political affiliation, we would not want to prevent governors in general from using political affiliation as a criterion for such positions." Similarly, in the instant case, while Crowell might find it conceivable that a Democrat or Republican could do the job, we would not want to prevent him from using political affiliation as a condition if he thought it was appropriate.

The plaintiff next argues that his job was not one where political affiliation could be made a requirement. First, he points out that in the three major areas of responsibility, he had very little discretion. Thus, in the purchase and assignment of autos, Assaf did not decide how many autos to purchase and his assignment of agency vehicles was subject to Fields' approval. Moreover, he had no authority in regard to executive cars. In regard to the auction, a formula was used to decide which cars would be sold and the target price for each one. In regard to repair and maintenance, he simply followed the manufacturers' service suggestions and contracted with outside vendors based on a standard contract (which he did not draft) with labor rates tied to inflation.

In regard to other job duties, Assaf did not control his own budget and could not hire or fire employees without Fields' approval. In fact, any significant thing Assaf did had to receive Fields "blessing," as Fields put it. In sum, plaintiff contends that he simply did not have duties broad enough that political affiliation could be considered for his job.

In reply, the defendants argue that plaintiff had input, if not complete control, over certain job duties so that his role as one who provided input into a major governmental program is sufficient to defeat his claim. Additionally, they assert that he is pursuing the same strategy that has failed for others in his position, simply pretending that he really did nothing at his job when the facts show otherwise.

After reviewing the parties' briefs, we conclude that the job of Director of the Bureau of Vehicle Management is not one in which party affiliation is an appropriate requirement. We reach this conclusion based on two reasons.

First, while a number of factors can be considered on this issue, the overarching factor is whether the worker has "meaningful input into decision making concerning the nature and scope of a major [government] program." *Peters, supra*, 16 F.3d at 1353. Thus, the employee must not only have input but the input must be into a major government program. Obviously, overseeing the cars owned by the Commonwealth and used by its agencies is a government program but, in our view, it is not a major government program, at least not in the sense the cases in this area have used that term.

A major government program would involve services to the general public or to a sizable portion of the public. In the Third Circuit, for example, in *Waskovich, supra*, the job at issue was Director of New Jersey's Division of Veterans' Administrative Services, an agency that primarily provided nursing home care to New Jersey veterans but which also had a part in deciding what other benefits might be made available to veterans. 2 F.3d at 1302 and n. 9. In *Peters, supra*, the job at issue was Secretary of the Delaware River Port Authority, an agency created by compact between Pennsylvania and New

Jersey, charged with operating the bridges across the Delaware River between the two states, developing a port area, and operating an interstate rapid transit system. 16 F.3d at 1348. In *Brown, supra*, the job at issue was county assistant director of public information, responsible for presenting the views of the county commissioners to the public and for promoting county projects. 787 F.2d at 170.

Other circuits have dealt with similar government programs. In *Collazo Rivera, supra*, the job was regional director of the Puerto Rican Housing Authority, a government agency responsible for housing programs in rural areas. 812 F.2d at 260. In *Rice, supra*, the job was administrative assistant in a geographic district in Ohio responsible for maintaining the roads under the control of the Ohio Department of Transportation. 14 F.3d at 1137. In *Selch supra*, the job was superintendent of a subdistrict of the Indiana Department of Highways, responsible for maintaining roadways in that subdistrict. 5 F.3d at 1044.

In contrast, in the instant case, the plaintiff's job was with a government program that served state agencies, not the general public or a segment of it. Moreover, the program was limited to providing the agencies with a discrete service, transportation by state-owned automobiles. This does not qualify as a major government program.

We acknowledge that the defendants would assert that the Bureau does serve the public because it conducts auctions at which the public appears. But this is only a tiny segment of the public, who appear voluntarily for what is essentially a commercial transaction — the purchase of a car.

Additionally, mere contact with the public does not transform a person's job into a political one. The Third Circuit has held that a person whose job it is to explain policy to the public has no first amendment protection. *See Brown, supra.* However, in *Zold, supra*, the court stated that a person's job is not political simply because she informed the press of upcoming agendas for the Township and received and responded to citizen complaints. 935 F.2d at 638.

In the instant case, Assaf's job was akin to the one in *Zold*, not *Brown*. He did not promote policy. He attended conferences of the National Fleet Administrators but did not "represent" the Commonwealth at them in the sense of presenting its policies or views. He had contact with the public when he supervised the auctions, but again his role at these was not to promote policy.

Our second reason for concluding that party affiliation is not an appropriate requirement for the job is that the cases have stated that the worker must act as an adviser or formulate plans for the implementation of broad goals. *See Peters, supra.* Consistent with this emphasis on broad goals is the Sixth Circuit's statement in *Rice*, quoted above, that an employee supervisor who has many responsibilities may not be in a political job if those responsibilities have only limited and well-defined objectives. 14 F.3d at 1139.

In the instant case, there is no doubt that Assaf's job was a supervisory one. He ran the day-to-day operation of the Bureau. He had, at the very least, input into hiring and firing decisions. He also disciplined workers. However, as noted above, being a supervisor is not enough; he must have had input into broad goals, and his job responsibilities must have been broad in scope as well.

Assaf had no input into broad goals nor were his job responsibilities broad in scope. He had to do three main things in his job: (1) assist the Deputy Secretary in establishing procedures and policies for obtaining and maintaining the Commonwealth's fleet of cars; (2) insure that the cars were serviced and repaired properly; and (3) oversee the auctions.

None of these duties involve broad goals or responsibilities, and thus this case is easily distinguishable from *Waskovich*, upon which the defendants so heavily rely. In *Waskovich*, the plaintiff had input into basic policy decisions concerning New Jersey veterans affairs and was authorized to speak about the agency's policies.

For the most part, the other factors we must consider do not assist the defendants either. We grant that certain factors are in their favor. Assaf's duties were not merely technical, he participated in meetings and he could control others. However, the remaining factors go against them. Assaf did not prepare budgets. He could not hire or fire other employees, although he had input into these decisions. Nor could he speak in the name of policymakers. (As noted above, handling customer complaints is not the equivalent.) [FN2]

> FN2. Quite frankly, we do not know what to do with the salary factor. In *Peters*, the Third Circuit stated that salary was a factor to be considered and concluded there that in *Waskovich* a salary of $64,000 in July 1990, when the plaintiff was discharged, supported the political nature of the job and in *Peters*, a salary of $57,000 in January 1991 did the same. Assaf was making $52,000 in March 1995 when he was discharged. We do not know how

> we can compare the salaries over time, nor have the parties attempted to assist us in that regard.
>
> However, if anything, the plaintiff's salary supports our conclusion that he did not hold a political job since it was about 9% less than what the plaintiff was earning in *Peters* about five years earlier.

Finally, the defendants have also argued that the job is political because it could be a source of political embarrassment to high officials in the Department. *Citing Waskovich*, they rely on the possibility that if the job was not performed properly, "waste, financial impropriety and fraud" (supporting brief at p. 12) could result and have negative consequences for the party in power.

Waskovich does not support this contention. *Waskovich* (and the cases it cited) mentioned differences in political philosophy as a potential cause of political embarrassment, not incompetence. 2 F.3d at 1302. In other words, if the position had enough discretion that the holder of the office could make political choices different from high-level officials, the office could be considered political. In contrast, ineffective job performance has nothing to do with political philosophy, is a danger no matter what the political affiliation of the person holding the job, and can be dealt with either way by firing the person.

That the job is not a political one is buttressed by the reasons Crowell gave for discharging the plaintiff. Crowell asserted that he wanted the Bureau to emphasize customer service with both the public and employees of state agencies. He supposedly discharged Assaf because Crowell perceived him as

not having the type of attitude consistent with that goal. Significantly, Crowell does not mention that he wanted to bring to the Bureau substantive changes in how it performed its mission, just a better attitude.

The defendants have also relied on the state law classifications of the plaintiff's job as a policymaking one, one exempt from civil service protection, and one where the occupant serves at the pleasure of the agency head. However, state law treatment of a job is just one factor to be considered, and it is outweighed by those discussed above.

Finally, we reject the defendants' reliance on *Faughender, supra*, to argue that political affiliation is an appropriate consideration for the job because the Director of the Bureau controlled the line of communication to the Deputy Secretary and the Secretary. In *Faughender*, the job at issue was secretary to the major, obviously a crucial position for the free flow of information to that official. In the instant case, on the other hand, Assaf only had to communicate to Fields about matters in the Bureau about which Fields would have had an ability to measure Assaf's performance. It may be only a matter of degree, but a distinction is proper here.

Since we have decided that the first amendment protected Assaf's job, we must now decide if the defendants have qualified immunity from the plaintiff's damage claim.

B. Qualified Immunity.

The Supreme Court has stated that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). Even where they violate clearly established rights, officials will nonetheless be immune from suit if they acted in a manner which they reasonably believed to be lawful. *Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir.1995).

For a right to be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531 (1987). While the right need not have been held unlawful under the factually identical circumstances, "in the light of pre-existing law the unlawfulness must be apparent." *Id.; Good v. Dauphin County Social Services for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir.1989). A conclusion after the fact that the conduct is unlawful is insufficient, since government officials should not "be expected to anticipate subsequent legal developments." *In re City of Philadelphia, supra*, 49 F.3d at 961 (quoted case omitted).

The defendants argue that they are entitled to qualified immunity because officials in their positions could reasonably have believed that Assaf's job was a political one from which he could have been discharged on the basis of party affiliation. In support, they point out that every case presenting a *Branti-Elrod* claim is "fact specific," *Peters, supra*, 16 F.3d at 1353, that the case is close enough to *Waskovich* to have allowed the defendants to have relied on that case, and that at least some of the factors used to determine whether a job is political favored their decision to discharge Assaf. Specifically, they rely on the state's classification of the position, that it was supervisory and played a role in hiring, firing and discipline, that the job had

contact with the Deputy Secretary and Secretary of the Department with (in their view) policy discussions.

In opposition, the plaintiff relies on the fact that it was well established before his discharge that a person could not be fired from certain positions on the basis of political affiliation and that Crowell knew this. Hence, if the first amendment protected his job, the defendants should be held liable.

We agree with the defendants that they are entitled to qualified immunity. Initially, we note that the plaintiff's opposition argument is totally inadequate. Of course, in the abstract the defendants could not fire someone from a job that was not political, but the test is whether the contours of the right were sufficiently clear that a reasonable official would have known that he could not have fired the plaintiff for political reasons. We do not believe that it is true for the following reasons.

First, except for *Waskovich*, the existing Third Circuit precedent provided no guidance since it was factually distinguishable, as our discussion of *Peters*, *Zold* and *Brown* make clear. And *Waskovich* itself would have informed the defendants only of what was sufficient for finding that the job was political job, not what was necessary.

Second, the plaintiff's position could fairly be characterized as being in "middle management," below the actual policymakers but above a first-level employee. Other circuits have split about whether these types of supervisory positions are entitled to first amendment protection. *Compare Akers v. Caperton*, 998 F.2d 220 (4th Cir.1993) (county superintendents in West Virginia responsible for road maintenance and repair were not in a political job even though they implemented policy)

with *Selch, supra*, 5 F.3d at 1045-1046 (disagreeing with *Akers* about a similar job in Indiana and treating implementation of policy just as important as creating it). The defendants could have thought that, even though plaintiff's input into policy was minimal, they still had to rely on him to implement it. *See also Collazo Rivera, supra*, 812 F.2d at 262 (reliance on a detailed guidebook does not render a job nonpolitical since implementation of policy is just as important as policymaking).

Finally, as we noted above, some factors did favor the defendants; Assaf's duties were not merely technical, he participated in meetings, and he could control others. Moreover, even on the ones that did not favor them the defendants could have reasonably believed that his input into them made his job political.

In conclusion, we accept the qualified immunity defense and we will issue an appropriate order.

ORDER

AND NOW, this 13th day of February, 1998, it is ordered that:

1. The defendants' motion for summary judgment (doc. 10) is granted.

2. The Clerk of Court shall enter judgment in favor of the defendants and against plaintiff and close this file.